STATE OF MICHIGAN

COURT OF APPEALS

BRIAN LITTEN and CHRISTINA LITTEN,

Plaintiffs-Appellants,

v

BARTON MALOW COMPANY,

Defendant/Cross-Plaintiff-Appellee,

and

MACOMB COMMUNITY COLLEGE,

Defendant-Appellee,

and

WESTWOOD CARPENTRY COMPANY,

Defendant/Cross-Defendant.

UNPUBLISHED
November 22, 2011

No. 299727
Macomb Circuit Court
LC No. 2009-001817-NO

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

In this suit arising from a slip and fall, plaintiff Brian Litten[1] appeals by right the trial court's orders dismissing his claims against defendants Barton Malow Company[2] and Macomb Community College. On appeal, Litten argues that the trial court erred when it granted Barton Malow's motion for summary disposition because there were questions of fact as to whether Barton Malow breached its duty to warn him about or rectify readily observable dangers within the common work area. Litten also argues that the trial court erred when it determined that the

[1] Brian Litten's wife, Christina Litten, sued defendants for loss of consortium. For ease of reference and because her claims are derivative, we shall use Litten to refer to Brian Litten.

[2] In the captions for the documents submitted to the lower court, Barton Malow is listed—apparently incorrectly—as Barton Malow Excel Construction Services, LLC.

Community College was entitled to governmental immunity and dismissed his claims accordingly. Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

The Community College contracted with Barton Malow to serve as the general contractor on a construction project involving a building on its campus. Westwood Carpentry Company provided carpentry services for the project and sub-contracted with International Building Products to provide and install projection screens in the building. Litten testified at his deposition that he was working for a placement agency in March 2008 and that the agency placed him with International Building Products where he worked as a construction laborer.

On the day at issue, Litten went to the Community College to deliver and install several projection screens. Ernie Kondor, Litten's co-worker, drove them to the Community College in a van. Kondor parked the van near the main entrance to the building where they intended to install the screens. There was a paved walkway from the doors to the parking lot at the point where Kondor parked. Although it had been cleared at some point, there remained some rough patches of ice on the walkway.

Litten stated that he made four or five trips from the van into the building. He and Kondor carried a larger screen inside together and then returned to get individually some smaller screens. Litten said that he went to the van to get another screen and was headed back to the building along the walkway leading to the main entrance when he fell: "I take a step with the right leg, hit some ice, buckled, snapped my leg in half, I fell down." As a result of the fall, Litten broke his fibula and ankle. A surgeon repaired the break with a plate, but he has since had chronic pain and poor balance.

In April 2009, Litten sued Barton Malow and the Community College for damages arising from his fall. He alleged that, as the general contractor for the construction project, Barton Malow had a duty to ensure that the common work areas were free of hazards and that it negligently failed to clear the walkway of ice. He also alleged that the Community College similarly had a duty to ensure that its walkways were free of hazards and negligently failed to remove the ice. Litten amended his complaint in April to include his wife's loss of consortium claim. After Barton Malow served him with notice of non-party at fault, Litten amended his complaint again to add Westwood as a defendant. Litten alleged that Westwood also had a duty to ensure that the common work areas were free of hazards and negligently failed to clear the walkway of ice.

Barton Malow filed a cross-complaint against Westwood in October 2009. It alleged that Westwood had a duty—under various theories—to indemnify Barton Malow for any damages that it might be ordered to pay to Litten as compensation for his injuries.

In March 2010, the Community College moved for summary disposition. The Community College argued that Litten's claims were barred by governmental immunity. The Community College explained that the walkway where Litten fell was not adjacent to a highway under its jurisdiction and was not part of a public building. As such, neither the highway nor the public building exception to governmental immunity applied to Litten's claims. The Community

College also argued that it had no duty to clear the natural accumulation of snow and ice from the walkway.

Barton Malow moved for summary disposition in April 2010. It stated that the undisputed evidence showed that the exterior areas of the building under renovation had been returned to the Community College's control and, for that reason, the walkway was not part of a common work area. It also argued that, even if the walkway were within a common work area, the ice did not pose a danger to a significant number of workmen. For that reason, Barton Malow maintained that the common work area doctrine did not apply.

Litten and his wife stipulated to the dismissal of their claims against Westwood in May 2010.

The trial court entered separate opinions and orders addressing the Community College and Barton Malow's motions in June 2010. The trial court determined that the walkway at issue did not involve a defect cognizable at law under the highway exception to governmental immunity. It also determined that the sidewalk was not part of the building to which it led. As such, the public building exception to governmental immunity also did not apply. For these reasons, it concluded that the Community College was entitled to governmental immunity. Accordingly, the trial court dismissed Litten and his wife's claims against the Community College under MCR 2.116(C)(7) and (C)(10).

As for Barton Malow, the trial court determined that the evidence showed that, in addition to Litten and Kondor, there was only one other contractor working at the site at the time of the accident. Given this evidence, the court concluded that—even if the walkway were within a common work area—the common work area doctrine did not apply because any hazard did not pose a danger to a significant number of workmen as a matter of law.

The trial court signed an order denying Litten's motion for reconsideration in July 2010. The trial court also entered an order granting Barton Malow summary disposition against Westwood on its claim for indemnification.

This appeal followed.

II. MOTION TO REOPEN DISCOVERY

A. STANDARD OF REVIEW

We shall first address Litten's claim that the trial court erred when it denied his motion to reopen discovery. This Court reviews a trial court's decision to deny a motion to permit discovery after the passage of a discovery deadline for an abuse of discretion. See *Kemerko Clawson LLC v RxIV, Inc*, 269 Mich App 347, 349-351; 711 NW2d 801 (2005) (noting that trial courts have the discretion to set and enforce scheduling orders); see also MCR 2.401(B)(2). A trial court abuses its discretion when it selects an outcome that is outside the range of reasonable and principled outcomes. *Safian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

B. ANALYSIS

In June 2009, the trial court entered an order that limited the time for discovery: "All discovery, including depositions, interrogatories, medical examinations, etc., shall be initiated by 11/30/2009 unless extended by order of the Court." After the parties stipulated to an extension of the discovery deadline, the trial court entered an order extending the time limit to January 29, 2010.

Barton Malow noticed its intent to depose a representative from Westwood and the Community College for December 16, 2010, but later decided not to depose the representatives. In February 2010, Westwood gave notice that it intended to depose the manager for the construction project, Scott Schollenberger, and the superintendent for the construction project, Chad Beldyga, in March 2010. However, a few days after its notice, Westwood wrote Litten's trial lawyer and stated that it would not be proceeding with the depositions.

In February 2010, Litten also moved for permission to amend or withdraw an admission that he made by failing to timely respond to Westwood's request to admit. Litten's trial lawyer argued that the failure to timely respond was inadvertent, but the trial court denied the motion.

In March 2010, Litten moved for permission to reopen discovery. In its motion it noted that Barton Malow had noticed depositions for representatives from Westwood and the Community College, but then cancelled. In addition, Westwood gave notice that it intended to depose Schollenberger and Beldyga, but then cancelled those depositions as well. Litten argued that it did not seek to depose representatives from defendants' entities because Barton Malow and Westwood had already noticed depositions for those representatives. Given that it had relied on those notices in good faith, Litten argued that the trial court should reopen discovery to permit him to depose representatives from Barton Malow, Westwood, and the Community College. Although Litten recognized that the parties had already proceeded to case evaluation, he claimed that the reopening of discovery would not prejudice the parties and the deposition testimony was essential to determine which entity had responsibility for the walkway at issue. Litten also offered to pay for a new case evaluation.

At the hearing on Litten's motion, the trial court denied the motion to reopen discovery. The court explained that, although it would normally allow such a request, under the circumstances it would not:

> Right. And I don't have a problem doing that, but now I'm faced with [Litten's] inadvertent failure to answer requests to admit a couple weeks; inadvertent [failure] to reschedule depositions; not aware that discovery wasn't done; and case eval that has already been had. And under those circumstances, counsel, I'm going [to] exercise my discretion and . . . decline to grant your request to reopen discovery. At this point once you have gone to case eval discovery is closed. I don't think that it's appropriate that you be able to start all over again, frankly. . . .

On this record, we cannot conclude that the trial court abused its discretion when it denied Litten's motion to reopen discovery. Litten's primary argument was that he only failed to meet the discovery deadline because he relied in good faith on Barton Malow and Westwood's notices, which they subsequently withdrew. However, it is undisputed that Barton Malow *scheduled* its depositions for mid-December 2009—that is, Litten plainly knew by the middle of December that Barton Malow had not proceeded with the intended depositions. And, from that time, Litten still had approximately six weeks to schedule those depositions, had he wanted to do so. Similarly, Litten could not have relied in good faith on Westwood's notice because Westwood gave its notice after the close of discovery. Consequently, Litten did not have a valid reason for his failure to depose these witnesses within the time set for discovery.

In addition, the parties had already proceeded to case evaluation and begun to file their dispositive motions in reliance on the evidence adduced during discovery. For that reason, had the trial court granted Litten's motion, it would—in effect—have started this phase of the litigation over again; the parties would have had to return to case evaluation so that the evaluators could take into consideration any newly discovered evidence and would have had to file new dispositive motions. Because Litten did not have a bonafide reason for his failure to comply with the discovery deadline and the decision to grant the motion would have prejudiced the other parties, the trial court was well within the range of reasonable and principled outcomes when it refused to permit further discovery. *Safian*, 477 Mich at 12.

III. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

We next address Litten's arguments that the trial court erred when it granted summary disposition in favor of Barton Malow and the Community College and dismissed his and his wife's claims. This Court reviews de novo a trial court's decision to grant summary disposition. *Barnard Mfg Co, Inc v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009).

B. COMMON WORK AREA

Under the common law, with the exception of its own active negligence, a general contractor does not have a duty to ensure the safety of workers on a construction project; instead, the immediate employer of a construction worker is responsible for the worker's job safety. *Latham v Barton Malow Co*, 480 Mich 105, 112; 746 NW2d 868 (2008). Nevertheless, our Supreme Court has recognized an exception to that rule for common work areas. See *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53-54; 684 NW2d 320 (2004). Our Supreme Court explained that the exception recognizes that, as a practical matter, only the general contractor will be in a position to coordinate work or provide safety measures for all the subcontractors on a project. *Ghaffari v Turner Constr Co*, 473 Mich 16, 20-21; 699 NW2d 687 (2005). In addition, even when a subcontractor is aware of a safety problem, the subcontractor will often be unable to compel their superiors to rectify the condition. *Id.* at 21. To establish the common work area exception, a plaintiff must show that (1) the general contractor failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and

avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. *Ormsby*, 471 Mich at 54.

On appeal, Litten argues that the trial court erred when it dismissed his claims against Barton Malow because there was a question of fact as to each element of his common work area claim. In its opinion, the trial court declined to consider whether the walkway was within a common work area. Rather, the court determined that Litten failed to establish that the ice on the walkway constituted a hazard that posed a high degree of risk to a significant number of workmen. Nevertheless, we conclude that Litten failed to establish that Barton Malow had control over the walkway as a common work area.

Barton Malow presented affidavits in support of its motion for summary disposition that showed that the walkway was no longer a common work area at the time of Litten's fall because it had been returned to the Community College's control. Indeed, Beldyga averred that the Community College asked to have the construction fencing outside the building removed so that students could have access to the parking lot and sidewalks. He also stated that the project had moved inside the building and that the Community College resumed control over the exterior grounds. Schollenberger also averred that the Community College asked to have the construction fencing removed to allow student access to the parking lot and sidewalks.

In order to establish the common work area exception, Litten had to show that Barton Malow had "supervisory and coordinating authority" over a "common work area." *Ormsby*, 471 Mich at 57; see also *Latham*, 480 Mich at 113 (noting that the general contractor must be in control of the worksite). And the failure to establish Barton Malow's supervisory authority over the walkway would be fatal to Litten's claim against Barton Malow. *Ghaffari*, 473 Mich at 21. Accordingly, once Barton Malow moved for summary disposition under MCR 2.116(C)(10) on the ground that it did not have supervisory control over the walkway as part of a common work area, and properly supported its motion with evidentiary submissions, Litten had to demonstrate that there was a question of fact as to that issue with evidentiary submissions of his own. *Barnard Mfg*, 285 Mich App at 370.

In response to Barton Malow's motion, Litten argued that there was a clear factual dispute as to whether Barton Malow had control over the walkway because, in its affirmative defenses, the Community College alleged that the walkway was not under its control at the time of Litten's fall, which allegation contradicted the affidavits submitted by Barton Malow. But the allegation in this affirmative defense did not establish a question of fact as to whether Barton Malow actually had supervisory authority over the walkway as a common work area.

A party may plead inconsistent claims and defenses. See MCR 2.111(A)(2). Because the purpose behind pleadings is to give notice, courts generally do not treat allegations in pleadings as judicial or evidentiary admissions. See *Shuler v Mich Physicians Mut*, 260 Mich App 492, 513-514; 679 NW2d 106 (2004) (noting that courts will not treat pleadings as judicial admissions and generally disallow them as evidentiary admissions). Moreover, although trial courts are to consider the allegations in pleadings when reviewing a motion for summary disposition under MCR 2.116(C)(10), see MCR 2.116(G)(5), courts will only consider the allegations to be true where they have not been contradicted by documentary evidence. See *Young v Sellers*, 254 Mich App 447, 450; 657 NW2d 555 (2002). Finally, in the context of a (C)(10) motion, the non-

movant may not rest on pleadings alone to establish a question of fact; he or she must "by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4); see also *Patterson v Kleiman*, 447 Mich 429, 434 n6; 526 NW2d 879 (1994). Because Barton Malow submitted documentary evidence to support its claim that it did not have supervisory authority over the walkway, Litten could not rely on the Community College's pleadings to establish a question of fact on this element; rather, in order to avoid dismissal of his claim against Barton Malow, Litten had to come forward with documentary evidence of its own that showed that there was a question of fact as to whether Barton Malow retained control over the walkway as a common work area. MCR 2.116(G)(4); see also *Barnard Mfg*, 285 Mich App at 374-375.

On appeal, Litten also cites the Community College's answers to its interrogatories for the proposition that there was a question of fact as to whether Barton Malow had control over the walkway at issue. However, Litten did not cite those interrogatories in its brief in opposition to Barton Malow's motion for summary disposition or otherwise present them to the trial court in support of his contention that there was a question of fact on this issue. Accordingly, we cannot consider those interrogatories when determining whether the trial court properly granted Barton Malow's motion for summary disposition. See *Barnard Mfg*, 285 Mich App at 380 ("When reviewing a motion for summary disposition, this Court's review is limited to review of the evidence properly presented to the trial court.").

Litten failed to establish a question of fact as to this element of his common work area claim and, for that reason, the trial court properly granted summary disposition in favor of Barton Malow.[3]

C. GOVERNMENTAL IMMUNITY

Litten next argues that the trial court erred when it determined that the Community College was entitled to governmental immunity. Specifically, Litten argues that the trial court erred when it determined that the highway exception to governmental immunity did not apply in this case.

The Community College, as a political subdivision, see MCL 691.1401(b), is a governmental agency. MCL 691.1401(d). Therefore, it is entitled to immunity from tort liability while engaged in the exercise or discharge of a governmental function. MCL 691.1407(1). And it is beyond dispute that the maintenance of the Community College's campus—including its sidewalks—constitutes a governmental function. For that reason, the Community College is immune from suit unless Litten can establish an exception to the Community College's immunity.

[3] Although the trial court granted Barton Malow's motion for different reasons, we need not address those reasons. This Court will affirm a trial court's decision where it reached the correct result even if for a different reason. See *Hess v Cannon Twp*, 265 Mich App 582, 596; 696 NW2d 742 (2005).

The Legislature has codified several exceptions to this governmental immunity, but only one exception is relevant here: the highway exception.[4] The Legislature provided that governmental agency's that have jurisdiction over a highway must maintain the highway in reasonable repair. MCL 691.1402(1). Further, a person who "sustains bodily injury or damage to his or her property by reason of a failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair . . . may recover the damages suffered . . . ." *Id.*

In its motion for summary disposition, the Community College argued that Litten failed to establish that the walkway in question constituted a highway within the meaning of the highway exception to governmental immunity; specifically, the Community College argued that it cannot have jurisdiction over a highway and that—in any event—the walkway in question did not run parallel to a highway, but rather led from a parking lot to one of its buildings. The Community College supported its motion with photographs that clearly showed that Litten fell on a walkway that led from a parking lot to a building. And, in a supplemental brief, the Community College cited Litten's deposition testimony where he stated that his partner parked his van next to the curb in the parking lot. In response, Litten merely asserted, without any supporting evidence, that the sidewalk at issue was adjacent to a road and, consequently, was a highway within the meaning of the highway exception to governmental immunity. In a supplemental brief, Litten again asserted that the walkway was adjacent to a roadway and submitted a photo showing the walkway leading from the parking lot to the building in support.

The term highway—as used in the governmental tort liability act—means a "public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." MCL 691.1401(d). Although the statute defines highways to include sidewalks, not every sidewalk is included within the exception: "Caselaw has defined the word 'sidewalk' as a paved way that runs alongside and adjacent to a public roadway intended for the use of pedestrians." *Roby v Mount Clemens*, 274 Mich App 26, 30; 731 NW2d 494 (2007). Further, this Court has held that a parking lot is not a highway for purposes of the highway exception. See *Bunch v City of Monroe*, 186 Mich App 347, 349; 463 NW2d 275 (1990). Likewise, a driveway that services a parking area or building is not a public street—even when used by the public in that way—for purposes of the highway exception. See *Richardson v Warren Consolidated School Dist*, 197 Mich App 697, 704-705; 496 NW2d 380 (1992). As such, a sidewalk that runs adjacent to or from a parking lot or driveway is not a sidewalk subject to the highway exception under MCL 691.1401(d).

Here, the evidence showed that the walkway was adjacent to a parking lot. For that reason, the walkway was not a sidewalk within the meaning of the highway exception to governmental immunity. *Bunch*, 186 Mich App 349. Further, to the extent that the parking lot might have included a lane or drive for loading or unloading passengers in front of the building or that could be used to move from one roadway to another roadway, the existence of such a lane

[4] On appeal, Litten confined his discussion to whether the trial court properly determined that the highway exception did not apply to the walkway at issue. Therefore, we do not need to consider any other possible exception to governmental immunity.

or drive did not transform the parking lot into a highway for purposes of the highway exception. See *Richardson*, 197 Mich App at 704-705. Because Litten failed to establish that the walkway was a sidewalk within the meaning of the highway exception to governmental immunity, the trial court did not err when it dismissed his claim against the Community College under MCR 2.116(C)(7).

There were no errors warranting relief.

Affirmed. As the prevailing parties, Barton Malow and the Community College may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell